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ABRIC PROJECT MANAGEMENT SDN BHD

v.

PALMSHINE PLAZA SDN BHD & ANOR

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HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[COMPANIES WINDING UP NO: D5-28-311-1999]
15 MARCH 2007

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COMPANY LAW: *Winding up - Liquidator - Appointment and removal of - Principles - Jurisdiction of court to remove liquidator under s. 232 Companies Act 1965 for due cause shown - Some unfitness in liquidator must be shown to justify his removal - Removal of liquidator is not a matter of pure judicial discretion - Whether liquidator has exercised his discretion in best interest of liquidation - Whether company land sold at an undervalue - Whether any*

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element of collusion in sale transaction by liquidator - Liquidation at its tail end - Whether any practical or beneficial purpose to be achieved by removing liquidator at this stage

COMPANY LAW: *Winding up - Disposition of property - Whether liquidator*

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obtained valuation of company's land - Whether duty on liquidator to constantly obtain updated valuation reports - Whether obtaining verbal indications as to market value subsequent to obtaining valuation report is sufficient - Whether company land sold at an undervalue - Whether any element of collusion in sale transaction

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CIVIL PROCEDURE: *Res judicata - Principles - Similar issues raised in a previous application - Issue in question must have been determined finally and conclusively - Whether parties may raise for a second time in same suit, an issue that has already been determined either expressly or by necessary implication - Issues which have been canvassed in earlier application and have been*

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adjudicated by a court of competent jurisdiction cannot be re-opened - An abuse of process to re-litigate matter albeit under an apparent different form

A contributory and former director of the 1st respondent company (Mr. Ong Say Lam) filed this application under s. 232 of the Companies Act 1965 (encl. 58) to remove Mr. Lim Tian Huat from

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his office as Liquidator of the 1st respondent company *ie*, Palmshine Plaza Sdn. Bhd. and to appoint the Official Liquidator in his place. This was the 4th application by the applicant against the Liquidator. The 1st application concerned an application for leave to commence legal action against HSBC; the 2nd application was to seek an order to set aside

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the sale of Land; and the 3rd application related to disclosure of documents. The applicant's allegations revolved predominantly around the Liquidator's conduct in respect of the 1st respondent's sole assets,

two pieces of immovable property. The applicant raised several grounds in support of encl. 58, *inter alia* that: (a) the Liquidator had not furnished the required security and his appointment had not been gazetted; (b) the Liquidator did not investigate into the possibility of an action against HSBC; (c) no valuation was conducted for the purposes of the sale of the Land belonging to the 1st respondent to the 2nd respondent; (d) the said Land belonging to the 1st respondent was sold at a gross undervalue; and (e) the sale of the said Land smacked of collusion between the Liquidator, HSBC and the 2nd respondent.

Held (dismissing encl. 58 with cost):

(1) The jurisdiction of the court to remove a Liquidator under s. 232 for *"due cause shown"* is not to be exercised in the same way as if the power had been for the court to remove the Liquidator *"if the court shall think fit"*. Some unfitness in the Liquidator must be shown in order to justify his removal and the removing of him is not a matter of pure judicial discretion. (para 14)

(2) The Liquidator had furnished security to the satisfaction of the Official Receiver. Further, the allegation of a delay in furnishing the security deposit to the Official Receiver and that the Liquidator had entered into the SPA without having given security was untenable. (paras 15, 16 & 19)

(3) Adequate investigations had been made into the possibility of pursuing an action against HSBC but the Liquidator had exercised his discretion to refuse sanction to the applicant in the best interest of the liquidation. The Liquidator cannot be penalized for exercising his discretion against the applicant. (para 27)

(4) There was sufficient evidence to show that the Liquidator did seek and obtain a valuation on the said Land. The Liquidator could not be chastised for not constantly obtaining valuation as such valuations are expensive and the Liquidator was faced with limited liquidation funds. The Liquidator had also approached professional estate agents to source for potential buyers and in doing so obtained verbal indications as to the market value. The said Land was not sold at an undervalue. (paras 28, 29, 30 & 33)

(5) There was nothing unusual with the fact that the deposit and balance purchase price in respect of the SPA for the said Land was paid directly to HSBC. HSBC was the chargee over the said Land. There was no element of collusion in the transaction.
(paras 35 & 36)

(6) Parties cannot raise for a second time in the same suit, an issue that has already been determined either expressly or by necessary implication. The issues raised in encl. 58 by the applicant were the same issues that were raised by the same applicant in encl. 37, which was dismissed with costs. All the issues were determined and decided infavour of the Liquidator and the respondents. Pending the determination of the applicant's appeal in respect thereof, that decision was binding on all parties and the principle of *res judicate* applied against the applicant in encl. 58. (paras 41 & 42)

(7) The principle of *res judicata* applies to situations where the earlier decision and the current application are not the same. The focus is not on the application, *per se,* but on the issues that are raised. As long as the same issues were canvassed in the earlier application and have been adjudicated by a court of competent jurisdiction, it cannot be re-opened. Enclosure 58 was an abuse of the process as the applicant was seeking to re-litigate matter *albeit* under an apparent different form. (paras 43 & 46)

(8) The liquidation of the 1st respondent was at its tail end. There was no asset of any significance left to be administered. Accordingly no practical or beneficial purpose will be achieved to remove the Liquidator at this stage. The interest of the company (in liquidation) will not be served by acceding to this application. (paras 47 & 50)

Case(s) referred to:

Advance Housing v. Newcasle Classic Developments [1994] 14 ACSR 230 ***(refd)***
Chua Boon Chin v. JM McCormack & Ors [1978] 1 LNS 33 HC ***(refd)***
Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(foll)***
Lois Dreyfus v. Arune Challayya LR 58 1A 381 ***(refd)***
Malayan Banking Bhd v. Lim Poh Ho & Anor [1997] 2 CLJ 516 CA ***(refd)***
Ng Yok Gee & Anor v. CTI Leather Sdn Bhd (Metro Briliant Sdn Bhd & Ors Intervener) [2006] 3 CLJ 360 HC ***(foll)***
Peareth v. Marriot [1883] 22 Ch D 182 ***(refd)***
Procam (Pte) Ltd v. Nangle [1990] 3 MLJ 269 ***(refd)***
Re Adam Eyton Limited; Exparte Charkesworth [1887] 36 Ch D 299 ***(refd)***
Re George A Bond & Co Ltd [1932] 32 SR (NSW) 301 ***(refd)***
Re Sir John Moore Gold Mining Co [1879] 12 LR, Ch D 325 ***(refd)***
Re Trust of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee & Anor [1936] MLJ 141 ***(refd)***
Satyadhyan Ghasel & Ors v. Sint Deorajan Dobi & Anor AIR [1960] SC 941 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 232, 236(1), (2)(c)
Companies (Winding-Up) Rules 1972, rr. 46(5), 48

For the applicant - Dennis Xavier; M/s Dennis Xavier & Assoc
For the liquidator - Gregory Ling Lee Yi; M/s Ranjit Ooi & Robert Low
For the HSBC - ST Koh; M/s Benjamin Dawson
For the petitioner - Kenny Lee; M/s Kenny Lee, Chong & Assoc

Reported by Amutha Suppayah

JUDGMENT

Ramly Ali J:

[1] Enclosure 58 is an application under s. 232 of the Companies Act 1965, by a contributory and former director of the 1st respondent company (Mr. Ong Say Lam) to remove Mr. Lim Tian Huat from his office as Liquidator of the 1st respondent company ie, Palmshine Plaza Sdn. Bhd. and to appoint the Official Liquidator in his place.

Factual Background

[2] This is the 4th application by the applicant against the Liquidator. The 1st application concerns an application for leave to commence legal action against HSBC ("the 1st application"). The 2nd application was to seek an order to set aside the sale of Land ("the 2nd application"). The 3rd application relates to disclosure of documents ("the 3rd application").

[3] In respect of the 1st application, the Liquidator undertook an objective and professional assessment of the alleged claim put forward by the applicant against HSBC. He was not prepared to prosecute the action. Nevertheless, if the applicant wanted to commence the action in the name of the company, the terms of indemnity had to be settled. This was the usual and proper approach in such circumstances. An order was thereafter made by this court in that direction.

[4] The applicant had much complaints against the Liquidator on the sale of Lands belonging to the respondent. He has raised a number of issues in the 2nd application. Those complaints were rejected by this court and the 2nd application by the applicant was dismissed on 30 November 2006.

[5] The 3rd application turns on the construction of the Order dated 26 October 2004. The Liquidator took the view that in light of the Order, the carriage of the action against HSBC was entirely in the hands of the applicant. He accordingly declined to sign any affidavit verifying the list of documents. There is nothing *mala fide* about it. The matter has since been resolved.

[6] On 27 July 1999, the 1st respondent company was wound-up by this court pursuant to a winding-up petition presented by Abric Project Management Sdn. Bhd. (the petitioner) in respect of a debt of RM2,000,000. Pursuant to the winding-up order, one Mr. Lim Tian Huat was appointed as Liquidator over the 1st respondent company.

[7] The applicant's allegations revolve predominantly around the Liquidator's conduct in respect of the 1st respondent's sole assets, two (2) pieces of immovable property:

(a) a piece of land held under Lot. No. 726 P.N. No. 7225 and Lot No. 727, P.N. No. 7224, Section 8, Petaling Jaya ("said Land"); and

(b) a single storey terrace house located at No.1, Jalan 8/18, Taman Toman, Petaling Jaya, Selangor Darul Ehsan ("Single Storey Terrace Property"), situated beside the said Land.

[8] The abovementioned said Land and single Storey Terrace Property were sold to the 2nd respondent pursuant to two sale and purchase agreements dated 3 June 2003 for purchase prices of RM17,900,000 and RM100,000 respectively.

[9] The said Land was subject to a registered legal charge in favour of HSBC totaling RM33,000,000 as security for a Term Loan Facility of RM28,000,000 and an Overdraft Facility of RM5,000,000 granted by HSBC to the 1st respondent.

[10] Accordingly, the sale and transfer was completed on or about 24 November 2003 after the discharge of charge dated 24 November 2003 was released by HSBC in return for the full payment of RM17,900,000 paid directly to HSBC. The said Land was registered in the 2nd respondent's name on 27 November 2003.

Grounds Of The Application

[11] The applicant has raised seven grounds in support of encl. 58, ie, that:

(a) the Liquidator has not furnished the required security and his appointment has not been gazetted;

(b) the Liquidator did not investigate into the possibility of an action against HSBC;

(c) no valuation was conducted for the purposes of the sale of the Land belonging to the 1st respondent to the 2nd respondent;

(d) the said Land belonging to the 1st respondent was sold at a gross undervalue;

(e) no authority of court was obtained pursuant to s. 236 CA;

(f) the sale of the said Land belonging to the 1st respondent smacks of collusion between the Liquidator, HSBC and the 2nd respondent. The Liquidator is therefore unfit to act by reason of his connection to HSBC; and

(g) the Liquidator refused to disclose documents in his possession and has been a hindrance in the prosecution of the suit against HSBC.

Applicable Laws

[12] The applicant stipulates in encl. 58 that the application is made pursuant to s. 232 of the Companies Act 1965, which provides: "A liquidator appointed by the court may resign or on cause shown be removed by the court". This court is therefore given a discretion to remove a liquidator on cause shown.

[13] The question for determination by this court in respect of encl. 58 is whether under all the circumstances of the present case, due cause has been shown for the removal of the Liquidator. In determining this question, guidance can be garnered from the principles yielded from the following cases:

(a) In *Re Sir John Moore Gold Mining Co* [1879] 12 LR, Ch D 325, His Lordship Jessel M.R. at p. 331, defined the words "on due cause shown" to mean "I should say that, as a general rule, they point to some unfitness of the person - it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up - some unfitness in a wide sense of the term."

(b) In *Re Adam Eyton Limited; Exparte Charkesworth* [1887] 36 Ch D 299, His Lordship Cotton L.J. in commenting on the judgment on His Lordship Jessel M.R. above held at p. 303 that "it is not necessary, in order to justify the court under this section in removing the liquidator, that there should be anything against the individual" instead "... if the court is satisfied on the evidence before it that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the court has power to remove the present liquidator and of course then appoint same other person in his place".

(c) In the same abovementioned *Re Adam Eyton* case *(supra)*. His Lordship Bowen LJ then held in his judgment at p. 306 that: "... the due cause is to be measured by reference to the real, substantial, honest interest of the liquidation and to the purpose for which the liquidator is appointed. Of course fair play to the liquidator himself is not to be left out of sight, but the measure of due cause is the substantial and real interest of the liquidation."

(d) In *Chua Boon Chin v. JM McCormack & Ors* [1979] 2 MLJ 156, the court removed the liquidator as there arose a conflict of interest in that the liquidator was a director of the company in liquidation and had a close relationship with the other director. Accordingly when the issue arose as to whether or not to commence legal proceedings against the directors (which included himself) the court was satisfied that it was against the interest of the liquidation that he remain the liquidator.

(e) Also in the *Chua Boon Chin* case *(supra)*, the court referred to the case of *Re: George A Bond & Co. Ltd.* [1932] 32 SR (NSW) 301, wherein His Lordship Long Innes J. was quoted as saying: "in my view neither suspicion alone, nor even a *prima facie* case which might be rebutted, would either justify or require removal unless there were reason for apprehension that the interests of the liquidation would be imperiled by the continuance in office of the suspect, or unless it were shown that such removal would be for the advantage of those interest in the assets of the company."

(f) Finally, in *Advance Housing v. Newcasle Classic Developments* [1994] 14 ACSR 230, it was held that there has to be a real and not merely theoretical possibility of conflict of interest before a liquidator can be removed. A liquidator may act even though there has been a prior involvement with the company in liquidation, provided that the involvement is unlikely to impede the liquidator from acting impartially. However, in this case, there was an actual conflict as the liquidator had to adjudicate on whether payments made to his firm immediately before the company went into liquidation constituted an unfair preference.

[14] The jurisdiction of the court to remove a liquidator under s. 232 of the Companies Act 1965 for "due cause shown" is not to be exercised in the same way as if the power had been for the court to remove the liquidator "if the court shall think fit". Some unfitness in the liquidator must be shown in order to justify his removal and the removing of him is not a matter of pure judicial discretion. That being the case the liquidator has a right to say that he is not to be removed unless due cause is shown, (see: *In Re Sir John Moore Gold Mining Co. (supra)*.

1st Ground - Furnishing of Security by the Liquidator and Gazetting of Liquidator's Appointment

[15] The Liquidator has furnished security to the satisfaction of the Official Receiver. Reference is made to "Certificate that Liquidator or Special Manager has given Security" in Form 21 dated 21 November 2006, which evidences this.

[16] Further, the allegation of a delay in furnishing the security deposit to the Official Receiver is also unsustainable. Soon after the appointment as liquidator on 27 July 1999, the Liquidator had promptly issued a letter dated 10 August 1999 to the Official Receiver for a waiver of the security deposit.

[17] The Official Receiver only responded on 8 July 2003. However, the Liquidator never received the abovementioned Official Receiver's letter dated 8 July 2003 as it was addressed to the Liquidator's previous address. This is despite the fact that the Official Receiver had been notified of the Liquidator's current address *via* the required Form 73 (Notice of Change in Situation of Office of Liquidator).

[18] Upon discovery of this fact, the security deposit was promptly paid and the abovementioned certificate has been furnished.

[19] In addition, the applicant's allegation that the Liquidator had entered into the SPA on 3 June 2003 without having given security is untenable. Pursuant to r. 48 of the Companies (Winding-Up) Rules 1972 ("CWUR"), the security to be furnished by the Liquidator shall be in the manner directed by the Official Receiver. The Official Receiver only issued its response on 8 July 2003 informing that his application for a waiver of the security was refused and that he was directed to make a security deposit of RM2,000. By then, it would have been almost four years after the Liquidator's appointment.

[20] The applicant's allegation is therefore preposterous as it implies that the Liquidator would have to refrain from conduct of the liquidation and/or cannot begin on the liquidation of the 1st respondent, until he received directions from the Official Receiver as to the security to be given. Furthermore, it has been held that the payment of security is not a condition to the appointment of a liquidator unless the court felt that the liquidator's actions were such that he did not want to fill his office (see: In *Re Adam Eyton Limited* (*supra*).

[21] It may be said that the Liquidator could have chased the Official Receiver for his direction; but neither the liquidation nor any party was prejudiced by this. In *Procam (Pte.) Ltd. v. Mangle* [1990] 3 MLJ 269, the court was faced with a liquidator who had made two errors in his

conduct of a liquidation. First, he had erroneously failed to scrutinize or examine a bill of costs raised by the petitioning creditor for costs obtained in prior proceedings against the wound up company prior to its liquidation or failing that engage a firm of solicitors to do so. Secondly, the liquidator had also made the error of appointing a firm of solicitors who had previously acted for the petitioning creditor and a secured creditor of the company in liquidation. Nevertheless, the court held that they were both mistakes made in good faith and did not seriously prejudice the liquidation of the company. Further, it would not be in the interest of the company in liquidation to make such an order as most of the matters in the liquidation had been completed.

[22] Accordingly, here too, the Liquidator should not be penalized for not chasing the Official Receiver as this could be considered an honest omission and it did not prejudice any party to the liquidation, least of all the applicant who chose to play no part in the 1st respondent's liquidation at that material time.

[23] Further, it appears from the issuance of the abovementioned Form 21 that the Official Receiver has decided not to pursue the Liquidator on this allegation to which the Official Receiver is open to consider under r. 48 CWUR.

[24] With respect to the issue of the gazetting of the Liquidator's appointment, this obligation is tasked with the Official Receiver and not the Liquidator. Rule 46(5) CWUR provides that "... the Official Receiver shall, as soon as the Liquidator has given security, cause the notice of the appointment in Form 94(7) to be gazetted".

2nd Ground - Investigation Into Possible Action Against HSBC

[25] Contrary to the applicant's allegation, the Liquidator did indeed investigate into the possibility of pursuing an action against HSBC. As set out in detail in paras. 7 to 13 of the Liquidator's affidavit in reply affirmed on 16 August 2004, it is summarised as follows:

(a) the Liquidator's representatives met with the applicant, the applicant's former solicitors, Messrs Moses Susayan & Associates and the applicant's present solicitors on 18 September 2003 to discuss the applicant's request *via* the letter dated 18 September 2003 and also the possibility of sanction being given to the applicant to use the name of the 1st respondent to initiate legal proceedings against HSBC;

(b) no agreement was reached and the applicant was notified that legal advice would have to be sought before a decision could be made;

(c) the letter dated 12 November 2003 from the Liquidator' solicitors was issued informing the applicant that upon taking legal advice, it was decided that sanction be refused;

(d) the Liquidator nevertheless registered that he had no objections if the court were minded (in its discretion) to authorize the applicant, subject to certain terms and conditions. This was informed to the applicant by letter dated 5 August 2004;

(e) meanwhile, the applicant had already filed the application on 25 May 2004. As the applicant could not agree on the abovementioned terms and conditions, parties proceeded with the application; and

(f) this court thereafter decided on the application and authorized the applicant subject to the abovementioned terms and conditions earlier prescribed by the Liquidator.

[26] In any event, the court is satisfied that the Liquidator had acted reasonably in the best interest of the liquidation of the 1st respondent in refusing sanction as:

(a) the proposed proceedings against HSBC would involve high costs and expenses which the liquidation fund could not accommodate;

(b) the liquidation was at it's tail end; and

(c) upon a review of the 1st respondent's documents, it appears that the basis for the proposed proceedings against HSBC were superseded by fresh negotiations. In this respect, it appeared that the 1st respondent now was negotiating to sell the said Land to HSBC. Subsequently, HSBC informed the 1st Respondent that it no longer wished to pursue the negotiations.

[27] The court is fully satisfied that adequate investigations had been made into the possibility of pursuing an action against HSBC but the Liquidator had exercised his discretion to refuse sanction to the applicant in the best interest of the liquidation. The liquidator cannot be penalized for exercising his discretion against the applicant. The applicant cannot now seek to remove the Liquidator purely because he disagreed with him.

3rd Ground - No Valuation Conducted For The Sale Of The Said Land

[28] There are sufficient evidence to show that the Liquidator did seek and obtain a valuation on the said Land. Reference is made to the Report and Valuation issued by Messrs Colliers, Jordan Lee & Jaafar ("Colliers") dated 21 September 1999.

[29] The Liquidator could not be chastised for not constantly obtaining valuation as such valuations are expensive and the Liquidator was faced with limited liquidation funds. It is unreasonable for the applicant to now raise this against the Liquidator as he had never assisted the Liquidator or offered any funds whatsoever for the liquidation. This was despite attempts made by the Liquidator to obtain his views, which the applicant failed to respond to. The applicant did not even furnish the Liquidator with a statement of affairs despite being requested to do so.

[30] Meanwhile, the Liquidator did not sit on his laurels. He approached professional estate agents to source for potential buyers and in doing so obtained verbal indications as to the market value.

[31] Further and/or in any event, the true market value of the said Land could be better observed from the value attached to them by prospective purchasers as opposed to valuers. In this respect, reference is made to the decision of the Court of Appeal in *Malayan Banking Bhd. v. Lim Poh Ho & Anor* [1997] 2 CLJ 516 (CA) wherein it was held that "the true commercial value of a property is not what a valuer thought it should be, but the actual price that the property would fetch on the open market". The *Malayan Banking Bhd.* case *(supra)* is an authority for the proposition that the applicant cannot merely complain without having not taken any action himself.

[32] In this respect, the Liquidator was pursuing many offers that were made for the said Land. The only genuine offers received were for the amounts of RM17,000,000, RM12,000,000 and RM17,900,000. The Liquidator took the highest offer, ie, RM17,900.000.

4th Ground - The Said Land Was Sold At A Gross Undervalue

[33] Based on all the relevant document the court in satisfied that the said Land was not sold at an undervalue. Again, this allegation is clearly unsustainable in the light of the earlier decision of this court in dismissing the applicant's application *vide* encl. 37 with costs on 30 November 2006. This issue has been fully argued and considered in that application and the court has decided the issue against the applicant and thus dismissed the application (encl. 37). This allegation formed one of the core arguments of the applicant in support of his application to set aside the sale of the said Land *vide* encl. 37.

5th Ground - Authority Pursuant To s. 236(1)(c) of the Companies Act 1965 Was Not Obtained

[34] No such authority is required under s. 236(1)(c) of the Companies Act 1965. As was decided earlier in the hearing of encl. 37, the sale of the said Land did not amount to a compromise, instead it

was a straight forward sale pursuant to s. 236(2)(c) of the Companies Act 1965, entered into by the Liquidator on behalf of the 1st respondent.

6th Ground - Collusion And/Or Connection Between The Liquidator and HSBC

[35] The applicant makes this allegation by virtue of the fact that the deposit and balance purchase price in respect of the SPA for the said Land was paid directly to HSBC.

[36] There is nothing unusual by this. As stated above, HSBC was the chargee over the said Land. Accordingly, any sale of the said Land would be subject to the HSBC's charge. Only upon the issuance of the discharge of charge could the said Land be available free of encumbrances. Therefore, HSBC's consent to the sale of the said Land would be required. HSBC's had made it a requirement that the deposit and balance purchase price be paid directly to it before consent would be given and the discharge of charge rendered. There is no element of collusion in this transaction.

7th Ground - Liquidator's Request To Disclose Documents

[37] This allegation is a non-starter. The Liquidator is not refrained from disclosing the 1st respondent's documents to the applicant. The applicant himself admitted at para. 9 of the applicant's 2nd affidavit in Reply affirmed on 4 December 2006 that he has received from the Liquidator, his list of the 1st respondent's pre-liquidation documents. This list was provided pursuant to the consent judgment entered into between parties on 16 November 2006 *vide* the civil action commenced by the applicant in the name of the 1st respondent against HSBC *vide* the Kuala Lumpur High Court Civil Suit No.: D5-22-343-2005. The applicant has since inspected the documents on 19 December 2006.

Issue Estoppel

[38] All of the allegation made above (with the exception of Ground No. 7) were previously put forward and ventilated in full in the hearing and disposal of encl. 37. In encl. 37, the applicant had, *inter alia*, applied to set aside the sale of the said Land. The applicant raised the same arguments in support of encl. 37. Upon hearing the submissions of parties, this court dismissed with costs encl. 37 by an Order dated 30 November 2006.

[39] The question posed herein is if the certain issues had been raised and actively decided upon in an earlier proceeding, could the applicant now seek to raise the same issue again in a different application.

[40] A similar scenario was faced in the case of *Ng Yok Gee & Anor v. CTI Leather Sdn. Bhd. (Metro Briliant Sdn. Bhd. & Ors. Intervener)* [2006] 7 MLJ 28. In that case, a contributory and creditor of a company in liquidation also sought to remove the appointed liquidator. However, in prior proceedings, intervener to the action had also filed a removal application against the Liquidator to which this contributory and creditor had appeared by counsel and had actively supported this prior removal application. This prior removal application was dismissed with costs. It was held that the contributory and creditor was bound by the earlier decision on the ground of issue estoppel.

[41] Similarly herein, on the authority of *Hartecon JC Sdn. Bhd. & Anor v. Hartela Contractors Ltd.* [1996] 2 MLJ 57 that a decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or even in a subsequent a suit. Parties cannot raise for a second time in the same suit, an issue that has already been determined either expressly or by necessary implication.

[42] In the present case, it is clear that the issues raised in the present application (encl. 58) by the applicant are the same issues that were raise by the same applicant in encl. 37, which was dismissed with costs on 30 November 2006. All the issues were determined and decided infavour of the Liquidator and the respondents. The appellate court has yet to hear the appeal against the decision of this court in encl. 37. Pending the determination of the applicant's appeal, this decision shall be binding on all parties and therefore the principle of *res judicata* applies herein against the applicant in encl. 58.

[43] Further, the principle of *res judicata* applies to situations where the earlier decision and the current application were not the same. The focus is not on the application, *per se*, but on the issues that were raised. As long as the same issues were canvassed in the earlier application and have been adjudicated by a court of competent jurisdiction, it cannot be re-opened.

[44] The principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation or judicial decision. Primarily it applies as between past litigation and future litigation. When a matter or issue - whether on question of fact or a question of law, has been decided between two parties in one suit or proceeding, the decision is final (unless and until overruled on appeal) and neither party will be allowed in a future suit or proceeding between the parties to canvass the matter or issue again. This principle applies also as between two stages in the same litigation to the extent that the court having at an earlier stage decided the matter or issue in one way will not allow the

parties to re-agitate the matter or issue again at a subsequent stage of the same proceedings. A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit, (see: *Hartacon JV Sdn. Bhd. & Anor v. Harteb Contractors Ltd.* [1996] 2 MLJ 57; *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74; *Satyadhyan Ghasel & Ors. v. Sint Deorajan Dobi & Anor* AIR 1960 SC 941; *Peareth v. Marriot* [1883] 22 Ch. D 182; *Re trust of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew Ghee & Anor* [1936] MLJ 141.

[45] Parties cannot raise a second time in the same suit on issue that has already been determined earlier expressly or by necessary implication, (see: *Lois Dreyfus v. Arune Challayya* LR 58 1A 381).

[46] In the present case, based on the above authorities, the applicant cannot be allowed to raise all the issues which had been earlier decided against him in encl. 37 in the present encl. 58. It is clear that encl. 58 is an abuse of the process as the applicant is seeking to take a 'second bite at the cherry' ie, to re-litigate matter *albeit* under an apparent different form.

Liquidation Almost Concluded

[47] The liquidation of the 1st respondent is at its tail end. The 1st respondent's only major assets, the said Land and the Single Storey Terrace Property, have been sold in June 2003. This is also a valid factor to be considered. There is no asset of any significant left to be administered. Accordingly no practical of beneficial purpose will be achieved to remove the Liquidator at this stage.

[48] In the case of *Ng Yok Gee* case *(supra)*, *Chua Boon Chin* case *(supra)* and *Procam* case *(supra)*, it was decided that when considering the interest of the liquidation, to remove the liquidator at this stage would not benefit the liquidation. Such an order would also involve further costs and expenses, which include having to engage and remunerate a new liquidator who will have to incur costs going through the work already performed by the present Liquidator. The application only serves to further exhause and deplete the limited funds of the company. It is prejudicial to the interests of the creditors whose interests rank above the applicant's interest as a contributory.

[49] Finally, as can be seen from the quote taken from the *Re George A Bond* case, cited in the *Chua Boon Chin* case *(supra)*, a liquidator may be removed if it can be shown that the removal would be advantageous to those interested in the assets of the company. Here however, there

A are no more assets left in the liquidation and therefore none can be imperiled by the continuance in office of the Liquidator. Accordingly, fair play to the Liquidator ought to be regarded and the Liquidator be allowed to finalise the tail end of the liquidation.

B **Conclusion**

[50] The interest of the company (in liquidation) will not be served by acceding to this application.

[51] By reason of the aforesaid, there is no merit in encl. 58. C Therefore, encl. 58 is dismissed with costs.

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